

Sodexo America LLC and Patricia Ortega**Sodexo America LLC; and USC University Hospital and Service Workers United****USC University Hospital and National Union of Healthcare Workers.** Cases 21–CA–039086, 21–CA–039109, 21–CA–039328, and 21–CA–039403

July 3, 2012

DECISION AND ORDER REMANDING IN PARTBY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

The issue presented here is whether the Respondents Sodexo America LLC and USC University Hospital violated Section 8(a)(1) of the Act by maintaining a rule that permits off-duty employees to enter the Hospital only if they are visiting patients, are patients themselves, or are conducting “hospital-related business.” The judge concluded that there was no violation and dismissed the complaint.¹

For the reasons set forth below, we reverse, and we remand to the judge the related issues concerning four employees disciplined under the Respondents’ no-access policy.

Facts

Respondent USC University Hospital operates a large acute-care hospital in Los Angeles. It subcontracts its cafeteria and food services operations to Sodexo. The Hospital maintains a no-access policy covering off-duty employees, which states:

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee’s normal duties or duties as specifically directed by management.
3. Any employee who violates this policy will be subject to disciplinary action.

¹ On April 8, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, Respondent Sodexo filed cross-exceptions, and both Respondents filed briefs in support of the judge’s decision. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Both the Hospital and Sodexo have posted this rule, and the Hospital requires all employees working at the Hospital, including those of its subcontractors, to comply with the rule.

Off-duty employees who visit patients at the Hospital must do so under the same rules as other visitors. They must enter the facility through the public entrances, honor visiting hours, sign in at visitors’ desks, obtain and display visitor’s badges, and confine their presence to the locations needed to accomplish their visit. Similarly, off-duty employees entering the facility to obtain medical treatment are subject to the same protocol as members of the public: they undergo the admitting process, are given a wristband, and are otherwise treated as patients. Off-duty employees entering the facility to conduct hospital-related business do so as if they are on-duty, using employee entrances and badges, and are not required to sign in at the visitor’s desk.

On May 5, 2010, the Hospital placed employee Michael Torres on investigatory suspension for violating the no-access rule. During his suspension, Torres visited the facility, and security officer Charles Fuentes, an admitted agent of the Hospital, threatened to arrest him. On May 12, the Hospital demoted Torres.² On or about June 25, the Hospital orally warned three other off-duty employees—Ruben Duran, Alex Correa, and Noemi Aguirre—for violating the rule. There is no evidence in the record concerning the circumstances of any of the four employees’ presence at the facility when the Hospital disciplined them.

Discussion**1. The no-access policy**

In *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976), the Board held that an employer’s rule barring off-duty employee access to a facility is valid only if it limits access solely to the interior of the facility, is clearly disseminated to all employees, and applies to off-duty access for all purposes, not just for union activity. The Acting General Counsel contends that the Hospital’s no-access policy violates the third prong of this test, because the policy does not deny access for all purposes, but allows access for visiting patients, receiving care, and hospital-related business. For the following reasons, we agree in part with the Acting General Counsel and find that the Hospital’s no-access policy violates Section 8(a)(1) of the Act.

² The Hospital stipulated that Torres’s violation of the off-duty no-access policy was a “precipitating event” for both his suspension and demotion.

Recently, in *Saint John's Health Center*, 357 NLRB 2078, 2080–2083 (2011), the Board found that a policy barring off-duty employee access to the employer's facility except for employer-sponsored events violated the Act. The Board reasoned that, with this exception, "the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can. Such a rule is not consistent with *Tri-County*." Id. at 2082. Similarly, here, the "hospital-related business" exception to the Hospital's no-access policy provides management with the same unfettered discretion to permit off-duty employees to enter its facility "as specifically directed by management." Thus, as in *Saint John's*, because this policy allows the Respondent unlimited discretion to decide when and why employees may access the facility, we find that under *Tri-County*, the Respondent's no-access policy violates Section 8(a)(1) because it "does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose." Id. at 2083.

In the present case, the judge found that the Hospital intended that the third exception to its no-access policy ("to conduct hospital-related business") would apply only to employees who are at the facility to work an extra shift. But this interpretation renders the exception meaningless; employees who are at the facility to work are not off-duty and would not be subject to an off-duty access policy. And, to the extent that the rule is ambiguous, we construe it against the drafter; for present purposes, the intent behind the rule is irrelevant. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (no-access rule that employer intended to apply only to inside working areas but that could be understood by employees also to bar their access to outside areas violated *Tri-County*). Because the rule gives the Respondents free rein to set the terms of off-duty employee access, we find that it violates Section 8(a)(1) of the Act.³

³ In asserting that the Respondent's rule does not prohibit off-duty employee access for the purpose of union activity, the dissent ignores the plain language of the rule. The rule categorically prohibits all access by off-duty employees ("Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital"). The principal exception to the no-access rule is "to conduct hospital-related business." The rule then defines hospital-related business as "the pursuit of the employee's normal duties or duties as specifically directed by management." This definition clearly does not encompass, and would not be understood by any employee to encompass, Sec. 7 activity. (The only other exceptions, for visiting patients and seeking medical care, also do not encompass Sec. 7 activity.) Accordingly, on its face, the rule prohibits employee access for purposes of Sec. 7 activity while permitting access for any activity "specifically directed by management." The exception to the Respondent's no-access rule is thus even broader than the exception in *Saint*

We reject, however, the Acting General Counsel's argument that the no-access policy's exceptions for off-duty employees who are either visiting patients or seeking medical care also run afoul of *Tri-County*'s test. In the situations covered by those exceptions, the purpose for which the individuals seek access to the facility is unrelated to their employment, and access is granted or denied on the same basis and under the same procedures as for members of the public. The individuals covered by those exceptions are seeking access to the property as members of the public, not as employees. Moreover, the individual seeking to visit a patient has no alternative to seeking access to the facility where the patient is admitted. While alternative medical care providers may sometimes be available, we decline as a matter of policy to require that health care employers limit their employees' access to medical care in order to comply with the *Tri-County* requirements. Accordingly, we hold that exceptions for visiting patients or seeking medical care to a no-access policy for off-duty employees do not make the policy unlawful under the third prong of the *Tri-County* standard.⁴

2. Discipline of four employees under the Respondent's no-access policy

The Hospital admits that it disciplined employees Michael Torres, Ruben Duran, Alex Correa, and Noemi Aguirre because they violated the unlawful no-access policy. But simply because the Hospital issued the discipline pursuant to an unlawfully broad policy does not mean the discipline itself violated the Act. Under recent Board precedent, such discipline is unlawful only if the employee conduct underlying the discipline implicated Section 7 concerns. See *Continental Group*, 357 NLRB 409, 412 (2011). Although the judge found that the "Hospital has enforced the rule by disciplining employees who gained access to the interior of the hospital in violation of the rule, including, in this case, off-duty employees who entered the Hospital and engaged in union activities," there is no evidence in the record to support this finding. In keeping with the standard set out in *Continental Group*, which issued after the judge's decision in this case, we remand to the judge with instructions to reopen the record and determine whether the activity of the four-named employees implicated the concerns un-

John's for employer-sponsored events. As to the dissent's argument concerning "innocuous activities such as picking up paychecks, completing employment-related paperwork or filling out patient information," we observe that Sec. 7 activity—whether or not innocuous—is, by definition, protected by the Act.

⁴ See *Southdown Care Center*, 308 NLRB 225, 232 (1992) (holding that a policy restricting off-duty employee access except when visiting residents and following visitor rules does not violate *Tri-County*'s test).

derlying Section 7. If so, the discipline violated Section 8(a)(1) of the Act.⁵

ORDER

The National Labor Relations Board orders that the Respondents, Sodexo America LLC, and USC University Hospital, Los Angeles, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and enforcing a rule which limits off-duty employee access to the Hospital's facility for some purposes while permitting access for other purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Rescind the off-duty access policy to the extent that it permits off-duty employee access to the facility for some purposes while barring off-duty access for other purposes.

(b) Within 14 days after service by the Region, post at the Hospital's facility in Los Angeles, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by each Respondent's authorized representative, shall be posted by the Respondents and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, either Respondent has gone out of business or closed the facilities involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that

Respondent in the position employed by that Respondent at any time since April 1, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that this matter is remanded to Administrative Law Judge William G. Kocol to reopen proceedings to determine whether Michael Torres, Ruben Duran, Alex Correa, and Noemi Aguirre were engaged in activities implicating the concerns underlying Section 7 of the Act.

IT IS FURTHER ORDERED that, should the judge find that any of these employees was engaged in activities implicating the concerns underlying Section 7 when he or she was disciplined, the judge shall order an appropriate remedy available under the Act.

IT IS FURTHER ORDERED that the judge shall issue a supplemental decision on the remanded issue. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

MEMBER HAYES, dissenting in part.

Contrary to my colleagues, I find that the Hospital's off-duty no-access rule did not violate the third prong of the *Tri-County* test, which requires that such rules apply to off-duty access "for any purpose" and not just for union activity.¹ *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Saint John's Health Center*, 357 NLRB 2078 (2011), I dissented from the Board majority's view that only a uniform prohibition of off-duty access will pass muster under this test. Here, I dissent from the majority's application of that holding to find that the Hospital's rule is unlawful merely because it has an exception for "hospital-related business."²

For the reasons I stated in my dissent in *Saint John's*, the majority's unduly restrictive interpretation of the *Tri-County* test is not supported by Board law or principles. *Id.* At 2087–2088. This is even more evident here where the end result of the majority's holding is that a hospital cannot maintain a valid off-duty access rule if it also al-

⁵ We note that the Hospital, in its brief, asserts that three of the employees were disciplined under the rule after they engaged in a protest related to wages. Because this assertion is unsupported by record evidence and the case was tried before the issuance of *Continental Group*, *supra*, it does not affect our decision to give all parties the opportunity to present evidence.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ I express no opinion on whether *Tri-County* was correctly decided, but I apply it as extant law in this case. See *Saint John's Health Center*, 357 NLRB 2078, 2087 fn. 11 (2011).

² A reasonable employee would not equate the exception for "hospital-related business" to what the majority describes as "unfettered discretion" to permit or deny off-duty employee access. See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–648 (2004) (Board must give employer rule a reasonable reading to determine its lawfulness). Instead, a reasonable employee would understand it as a limited exception that does not discriminate against union activity.

lows employees to engage in innocuous activities such as picking up paychecks, completing employment-related paperwork, or filling out patient information. This was undoubtedly not a scenario intended by the Board in *Tri-County*. Accordingly, I would adopt the judge's finding that the Hospital's rule is valid and dismiss the charges that four employees were unlawfully disciplined pursuant to the rule.³

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT promulgate, maintain, or enforce a rule which limits your access to our facilities permitting access to off-duty employees who seek access for certain purposes while barring access to off-duty employees who seek access for other purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our off-duty access policy to the extent that it permits off-duty employee access to its facility for some purposes while barring off-duty access for other purposes.

USC UNIVERSITY HOSPITAL AND SODEXO
AMERICA LLC

³ Because the Acting General Counsel raises only a facial challenge to the Hospital's rule, in agreeing with the judge's decision, I do not rely on the judge's discussion of the testimony of the Hospital's human resources officer, Matthew McElrath, and employee Julio Estrada.

Alice J. Garfield, Esq., for the General Counsel.
Mark T. Bennett, Esq. (Marks Golia & Finch, LLP), of San Diego, California, for Sodexo.
Linda Van Winkle Deacon and Lester F. Aponte, Esqs. (Bate, Peterson, Deacon, Zinn & Young, LLP), of Los Angeles, California, for the Hospital.
Sophia Mendoza, Union Representative, for National Union of Health Care Workers.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on February 28, 2011. The first charge was filed November 4, 2010,¹ and the order consolidating cases, consolidated complaint and notice of hearing was issued November 24. The complaint as thereafter amended alleges that Sodexo America LLC and USC University Hospital have maintained a no access rule that violates Section 8(a)(1). The complaint also alleges that the Hospital unlawfully enforced that rule on several occasions. Sodexo and the Hospital filed timely answers that denied that the rule was unlawful.

Before the hearing opened the Hospital filed a motion for summary judgment with the Board. The Board denied the motion without prejudice to its renewal at the hearing; Member Hayes dissented and would have granted the motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Sodexo, and the Hospital, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a corporation, operates an acute care hospital at its facility in Los Angeles, California, where it annually derives gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5000 directly from points located outside the state of California. The Hospital admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sodexo, a corporation, with a place of business in Gaithersburg, Maryland, is engaged in the business of providing food and environmental services. It annually provides services for the Hospital valued in excess of \$50,000. Sodexo admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

The Hospital operates an acute care facility of about 500,000 square feet with about 300 patient beds. It typically has over 200 patients and employs over 1250 workers. Patients and visitors enter the facility through two entrances; each entrance has a staff desk where visitors and patients are required to sign

¹ All dates are in 2010, unless otherwise indicated.

in. The Hospital provides each employee with an identification badge; the badge allows them to enter the Hospital through employee entrances and enter areas inside the Hospital not accessible to nonemployees.

Sodexo operates a cafeteria in the Hospital and prepares and serves food to the patients. Members of the public are not allowed in the cafeteria. Sodexo is required to have its employees follow the same work rules that the Hospital requires of its employees.

At all times material the Hospital has maintained and enforced the following rule:

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
3. Any employee who violates this policy will be subject to disciplinary action.

The Hospital carried over this rule from its predecessor employer. Sodexo also posted the same rule for its employees working at the Hospital. The Hospital has enforced the rule by disciplining employees who gained access to the interior of the hospital in violation of the rule, including, in this case, off-duty employees who entered the Hospital and engaged in union activities.

Mathew F. McElrath is the Hospital's chief human resources officer. McElrath credibly explained that the Hospital needs the rule to assist in providing a safe and efficient environment for on-duty employees, patients and visitors. The rule allows the Hospital to maintain control of the times that employees have access to patient records and to sensitive areas of the Hospital. In this regard the rule allows the Hospital to assure that employees are accessing that information or are in those areas only when the employees are being properly supervised. McElrath also explained that if off-duty employees enter the facility and began performing work, the Hospital may be required to pay them, perhaps at an overtime rate, even though the Hospital had not authorized the work.

As written, the rule allows off-duty employees to enter the Hospital under three circumstances. First, off-duty employees may enter the Hospital to visit patients. Of course, members of the public are also allowed to visit patients. Off-duty employees visiting patients must do so under the same conditions as all other visitors. That is, they must enter the facility at the entrances used by visitors; they may not enter through employee entrances. The visiting employees must confine their visits to visiting hours, sign in at visitors' desks, obtain and display a visitor badge, and confine their presence in the facility to the area needed to accomplish the visit. Second, off-duty employees may enter the facility to obtain medical treatment. Here too the off-duty employees are treated just as others obtaining medical treatment; they undergo an admitting process, are given a wristband and otherwise treated as a patient. Third, the rule

allows off-duty employees to enter the facility to conduct hospital related business, which is defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." In this regard McElrath explained that under this exception employees are always on paid time and under the supervision of the Hospital. In other words, this third "exception" is not really an exception at all and simply amounts to a definition of on-duty employees.

In sum, I conclude that the rule allows off-duty employees to enter the Hospital only under circumstances that members of the public at large are allowed, and then only under the same restrictions and conditions that members of the public are allowed inside.

Analysis

The General Counsel stipulated that he is challenging the facial validity of the rule and that this case does not involve issues of selective enforcement or dissemination of the rule.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board applied a three prong test to determine whether no-access rules are lawful. First, the rule must limit access of off-duty employees only to the interior of the facility. Second, the rule must be clearly disseminated to all employees. And third, the rule must apply to off-duty employees seeking access for any purpose and not just to employees seeking to engage in union activity. The General Counsel does not challenge the rule on the basis of the first two points; he does, however, contend that the rule is unlawful under *Tri-County* because it does not bar all off-duty employees from re-entering the Hospital. I conclude that this interpretation of *Tri-County* is too literal and results in consequences not intended by that decision. Under the General Counsel's interpretation, for example, a retail business could bar off-duty employees from its store only if it also banned them from shopping there; certainly the Board in *Tri-County* did not intend such a result. Likewise, in this case I conclude that the Board did not intend that a hospital could bar access only if it also barred its employees from becoming patients or visiting patients.

The General Counsel's reliance on *Baptist Memorial Hospital*, 229 NLRB 45 (1997), enfd. *Baptist Memorial Hospital v. NLRB*, 568 F.2d 1 (6th Cir. 1977), is misplaced. A careful reading of that case shows that the no access rule at issue there was not limited to the interior of the facility and was not clearly disseminated to the employees; the Board did not find the rule unlawful simply because the hospital there allowed employees to visit patients and pick up their paychecks. Moreover, here the record is clear that when the Hospital's off-duty employees visit patients they must do so as visitors and not as employees. The General Counsel also relies on *Intercommunity Hospital*, 255 NLRB 468 (1981). There the Board stated:

The Employer's rule states, "When you are off duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital." The rule on its face does not prohibit access for all purposes. In addition, employees testified that they were permitted to remain in the hospital after work while waiting for rides or carpools. As the Employer's rule does not meet the *Tri-County* standard, it cannot be used to prohibit solicitation by off-duty employees.

Id. at 474. But this statement is not sufficiently clear, at least to me, that the Board was holding that simply allowing off-duty employees to visit patients in a hospital would taint a no access. This is especially so in light of the rule at issue in *Southdown Care Center*, 308 NLRB 225, 232 (1992), which allowed off-duty employees to come to a health care facility if they “. . . [have] family or friends in the home [to] visit . . . but [they] must follow visitor rules.” There, Administrative Law Judge Richard Judge Linton held: “On its face, [the home’s] limited-access rule complies with the *Tri-County* conditions.” And here, unlike *Intercommunity*, the rule’s reference to “official business” is clarified on its face to mean “the pursuit of the employee’s normal duties or duties as specifically directed by management.”

In *San Ramon Medical Center*, JD(SF) 83–03 (2003) (2003 WL 22763700) Administrative Law Judge James Kennedy found that a rule similar to the rule in this case was lawful under *Tri-County*. Earlier, in *Garfield Medical Center*, JD(SF) 81–02 (2002) (2002 WL 31402769) Administrative Law Judge Lana Parke likewise found a rule similar to the one at issue in this case to be lawful. Although I acknowledge that no exceptions were filed to those decisions and thus they do not have the binding effect of Board decisions, it is of some persuasive value that two of my colleagues independently reached the same result I reach in this case. Finally, in a case apparently still pending before the Board, *Citrus Valley Medical Center*, JD(SF) 42–08 (2008), I concluded: “In applying *Tri-County* I believe I should not literally apply its language concerning off-duty employees having access to a facility for ‘any purpose.’”

Finally, the General Counsel presented the testimony of Julio Estrada, who has worked for the Hospital since 1994; he cur-

rently works as a lead respiratory therapist. Estrada gets paid every two weeks and he does not have his pay deposited directly to his bank account. Sometimes his payday falls on a day when he is not scheduled to work and sometimes, rather than waiting until his next workday to get his check, he enters the facility while off duty and retrieves the check. He does so using his employee badge. Over about a 5-year period on about 10 occasions Estrada’s supervisor saw him in the facility while off duty yet the supervisor allowed him to pick up his check. I conclude this evidence does not warrant a different result in this case for several reasons. First, the complaint alleges and the General Counsel stipulated at trial that he was only challenging the facial validity of the rule and was not alleging any violation of the rule as applied. This evidence is contrary to the narrow allegations of the complaint and the stipulation and thus the Hospital has not been accorded due process by allowing it to mount a defense. Second, even if I consider the evidence it is, at most, a de minimis abrogation of the application of the rule. Considering the size of the Hospital and the number of employees, a 100 percent rigid application of the rule cannot be expected.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

The complaint is dismissed.

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.